IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 67 OF 2000.

Shri Caitan Sylveira,
son of Philip Sylveira,
resident of House No.10,
Dongrim, Nuvem. .... Appellant.

VERSUS

S T A T E,
Through Maina,Curtorim
Police Station. .... Respondent.

Mr. S. G. Bhobe, Advocate for the Appellant.

Ms. W. Coutinho, Addl. Public Prosecutor for the State/ Respondent.

CORAM: D. G. DESHPANDE, J.

DATE: 16TH JANUARY, 2003.

ORAL JUDGMENT:

Heard Advocate for the Appellant and Additional Public Prosecutor for the State.

2. The accused is convicted under Section 304 Part II of I.P.C. and sentenced to suffer Rigorous Imprisonment for six years and to pay a fine of Rs.10,000/-, in default to undergo R.I. for one year. The fine, if realised, is ordered to be given to the parents of the deceased, either to the mother or father. The accused is given set off for the period from 4.1.95 to 25.3.95 undergone by him during trial.

3. The First Information in this case was lodged by one Felix Braganza (P.W.2). According to the prosecution case, the incident took place on 3rd January, 1995 at about 17.50 hours at Dongri, Nuvem. The incident took place on the road. On the aforesaid date and time P.W.4 had parked his car on the road and was talking to P.W.5 who also had stopped his scooter on the driver's side of P.W.4. There was no passage for the other vehicles to cross them. This caused hot exchange of words and people assembled, but even then some fight took place. At that time the victim came there so also the accused was present who was fighting with one Nelvy and the victim intervened. P.W.2 ran away from the spot and it is at that time that the accused, according to the prosecution, took out a knife and dealt a blow on the right side of the chest of the victim. Thereafter the accused ran away. The victim on the way to the hospital succumbed to his injury. In this background the accused came to be prosecuted for the offence of murder.

4. The prosecution examined 16 witnesses in all, out of which the eye witnesses are P.Ws.2, 4, 5, 7 and 8. Prosecution also examined the Doctor who performed the post mortem and other witnesses on other aspects of the prosecution case. The Trial Court came to the conclusion that the accused was guilty under

Section 304 Part II and convicted him as stated above. Hence this appeal.

5. Counsel for the Appellant, contended that the so called pen-knife has not been recovered. That the accused has surrendered on the next day of his own accord before the Police and the story of the prosecution that even at the time of surrender he was wearing blood stained clothes because no accused will put on blood stained clothes while surrendering to the Police. He further contended that admittedly there was no enmity and no reason for the accused to launch an assault on the victim. He stated that the accused has examined three witnesses in defence in order to show that the accused was not present at the site at the relevant time and further contended that all the eye witnesses namely P.Ws. 2, 4, 5, 7 and 8 have given evidence which is almost identical and verbatim reproduction of each other's testimony and therefore contended that this was a case where the accused was entitled to an acquittal.

6. In the alternative, the counsel for the accused, contended that looking to the age of the accused being 20 years and looking to the fact that the accused was a student; that the incident had occurred suddenly without premeditation and without

any enmity in a free fight, either the accused be given the benefit of Section 4 of the Probation of Offenders Act or the sentence be reduced considerably.

7. So far as the merits of the case are concerned, the learned Addl. P.P. urged that even if the knife was not recovered, it could not be a circumstance in favour of the accused. So far as the finding of blood stained clothes is concerned, she contended that there was nothing unnatural for the accused to put on blood stained clothes while he surrendered to the Police. She further contended that even though the accused has examined three witnesses in defence to prove that the accused was not present at the site, their evidence was rightly rejected by the Trial Court in view of the clinching evidence of the eye witnesses P.Ws.2, 4, 5, 7 and 8 who were speaking about the presence of the accused and who had admittedly no enmity or grudge against the accused. She stated that the evidence of these witnesses were consistent and corroborating each other and each of them has seen the accused taking out the knife and giving the fatal blow on the right side chest of the victim.

8. Regarding the aspect of the accused be given the benefit of Section 4 of the Probation of

Offenders Act, the learned Addl. P.P. contended that the facts and circumstances of the case do not call for any exercise in favour of the accused under Section 4, because this is a case where on a public road the accused had the courage to take out the knife and inflict a blow on the person who had gone to intervene. According to learned Addl. P.P. such case cannot be considered under Section 4 of the Probation of Offenders Act.

9. Regarding the third prayer for reduction of sentence, Addl. P.P. contended that the Court may pass appropriate orders.

10. There is no dispute about the fact that because certain persons were obstructing the road while travelling in their respective vehicles, a quarrel took place on the road and many people gathered because of obstruction. There is also no dispute that the deceased had any quarrel with anybody much less the accused. It is also not in dispute that the fight took place amongst those who had gathered there.

11. The five eye witnesses namely P.Ws.2, 4, 5, 7 and 8 have no grudge to bear against the accused. Nothing fruitful was brought out in their

cross-examination to show their credibility. One of those witnesses is P.W.2 who lodged the F.I.R., being an eye witness. All of them were knowing the accused by his name. In the F.I.R. the name of the accused is given as the assailant. The manner in which the blow was dealt is stated by all the five eye witnesses.

12. There is no merit in the contention of the counsel for the accused that the witnesses have given parrot like version. If the incident has been seen by these witnesses and they have given consistent evidence, the same cannot be rejected on the ground that it is almost identical. It is for the defence to bring out some damaging material in cross-examination either in the statement of the witnesses or in their evidence. I was taken through the entire paper book and also through the cross-examination of the witnesses, but nothing fruitful has been brought out, except for some minor omissions and contradictions here and there which do not affect the credibility of the witnesses.

13. It is true that the knife could not be recovered, but that also will not help the accused for claiming equity in this case. The use of the knife by the accused is established by the prosecution beyond

reasonable doubt. The medical evidence is supporting the evidence of the eye witnesses. This has been achieved by the prosecution by examining P.W.1 Dr. E.J. Rodrigues who has given evidence in detail about the post mortem examination conducted by him. He has stated about the length and breadth of the injury and also stated that the weapon had cut the plura of the right lung and then pierced through and through the upper lobe of right lung on its anterior border, 1.5 cms. from its interior margin of the right lung. The size of cut was 3 cms. Further the weapon had cut the pericardium of 3.2 cms. in upper part over great vessels in horizontal manner and then made a cut in the root of ascending Aorta of 3.5 cms. in its left anterior medial part and then cut the left auricle of 3 cms. and finally ended by making a cut in the upper part of hilum of left lung of 1 x 0.5 cms. The total depth of the wound from the skin to the hilum of left lung is 10.5 cms.

14. It will be clear from the nature of the injury that the injury has gone deep down in the lung. In this background the contention of the Advocate for the Appellant that it was a superficial injury without affecting any organ in the body has got to be rejected. The cause of death given by the Doctor is by haemorrhage and shock by stab injury on the right

side chest by penetrated, pointed and cutting weapon. Maybe it is a case of a single blow, but it was a pointed and fatal blow resulting in instant death of the victim who was son of Caetano Luis.

15. The evidence of the prosecution is strongly corroborated by the evidence of the Doctor. Apart from the recovery of the knife, the recovery of the blood stained clothes from the body of the accused, is a strong circumstance in proving his guilt. It is true that the accused of his own accord, surrendered to the Police, but there is nothing unnatural in going to the Police with clothes of blood stains. These clothes were sent to the Chemical Analyser and were found to contain blood stains of the deceased. The contention of the Advocate of the accused that the clothes were planted by the prosecution has got to be rejected in view of the direct and convincing corroborative evidence. Since out of the 16 witnesses, examined by the prosecution, five witnesses were vital and important namely P.Ws.2, 4, 5, 7 and 8 and P.W.1 and the witness on the recovery of the blood stained clothes from the accused and there are no reasons to discard their testimony, the conviction of the accused under Section 304, Part II I.P.C. cannot be interfered with.

16. The appeal must therefore fail. However, the submission of the Advocate for the accused that looking to the age of the accused at the time of the incident being 20 years, and being a student, absence of motive or intention and sudden fight, the accused should be given the benefit of Section 4 of the Probation of Offenders Act cannot also be accepted because Section 4 provides that while giving such benefit, the Court will have regard to the circumstances of the case including the nature of the offence and the character of the offender. Maybe that the accused was a young boy of 20 years of age, studying in College but the circumstances of the case and the nature of the offence and use of the knife in a free fight on a public road particularly without provocation of any kind from the deceased and infliction of a single fatal blow are the circumstances where the benefit under Section 4 of the Probation of Offenders Act can be given to the accused.

17. Having rejected both the contentions as stated above, the last aspect which remains to be decided is the prayer of the accused for reduction of sentence. The offence under Section 304 Part II is punishable by imprisonment upto ten years or with fine or with both, if the act is done with the knowledge

that it is likely to cause death or if there is any intention to cause death. Leniency was prayed for before the Trial Court. The Trial Court took the view that of late serious crimes in the State are on the rise and particularly in this District i.e. South Goa and deterrent punishment was required.

18. Counsel for the appellant however relied upon the judgment of the Supreme Court in **State of Punjab v. Mann Singh and another**, reported in A.I.R. 1983 S.C., 172 wherein the accused were convicted under Section 304 Part II and were sentenced to seven years and nine months and three years and six months. The Supreme Court upholding the sentence by the Trial Court, reduced the sentence to three years with fine of Rs.3000/-. Another judgment which was relied upon by the counsel for the accused in this regard was **Yogendra Morarji v. The State of Gujarat** reported in A.I.R. 1980 S.C., 660 where the conviction was under Section 304 Part II, but the sentence which was imposed on the accused was six months R.I. and fine of Rs.10,000/-. However, in the second case the Supreme Court had considered the right of private defence and the circumstances in which the accused came to exercise the said right. Therefore this case is of no use to the accused. However, the fact remains that in the earlier judgment of the Supreme

Court reported in A.I.R. 1983 S.C., 172 the sentence was reduced by three years.

19. In the instant case the accused is convicted for six years R.I. with fine of Rs.10,000/- or in default with R.I. for one year. The accused was a young boy of 20 years and was a student. Obviously there was no intention on his part to cause death. Suddenly in a fight he took out the knife and inflicted the injury. Therefore the prayer for reduction of sentence is required to be considered. I therefore pass the following Order :-

20. The appeal is party allowed. The conviction of the accused is maintained, but his sentence is reduced to four years R.I. with fine of Rs.5000/-, in default Rigorous Imprisonment for six months. The accused is entitled to the period of set off undergone by him from 4.1.95 to 25.3.95.

21. The accused is on bail. The accused to surrender for undergoing the sentence within three weeks from today. Thereafter his Bail Bond shall stand cancelled.

sl. **D. G. DESHPANDE, J.**